IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>vs.<br><br>KIRK COTTOM,<br><br>Defendant. | 8:13CR108<br><br>**BRIEF IN SUPPORT OF DEFENDANT'S MOTION IN LIMINE/ DAUBERT MOTION** |

COMES NOW the Defendant, Kirk Cottom, by and through his undersigned counsel, and respectfully submits this brief in support of his Motion In Limine/ Daubert Motion with regard to the expert testimonies of Plaintiff's experts, FBI Special Agent (SA) Steven A, Smith, Jr. , FBI Supervisory Special Agent (SSA) P. Michael Gordon and FBI Special Agent (SA) Jeff Tarpinian regarding the Network Investigative Technique employed in collection of evidence in the case at bar. Such testimony does not meet the standards established in Federal Rules of Evidence Rule 702 and *Daubert v. Merrell Dow Pharmaceuticals*, 113 S.Ct. 2786 (1983) as such testimony is not reliable, lacks foundation and cannot be fully tested without the NIT Source Code.

The trial court shall serve as the gate-keeper and shall ensure that any and all scientific or expert testimony is reliable. Because the government has withheld the NIT's Source Code, the full reliability of the NIT cannot be determined by the Defendant's experts' witnesses. Because the NIT cannot be fully tested, the reliability of the NIT remains unknown.

According to Federal Rule of Evidence Rule 702: A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

SA Smith, SA Tarpinian, and SSA Gordon are not qualified to testify because their opinions is not based on facts or data which are reviewable. The data cannot be fully verified without the NIT Source Code. The NIT is not a fully reliable method if it cannot be fully replicated and such cannot occur without the government sharing the Source Code. The government has not provided a satisfactory explanation as to why the Source Code cannot be shared and thus tested.

When determining the reliability of the underlying scientific principle and the technique or process that applies this principle, the Court enunciated four factors the trial court should consider. The Court identified these specific factors, but added that they are not definitive. "Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test." *Daubert*, 113 S. Ct. 2786 at 2796.

Of the four, the Court asked, can the evidence be empirically tested? Can the evidence be refuted? This is called falsifiability or refutability. "Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguished science from other field of human inquiry." *Id*. at 2796, *quoting* Green, "Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation." 86 Nw. U. L. Rev. 643, (1992).

In the case at bar, the Defense requested the NIT Source Code to empirically test the reliability and authenticity of the computer processed evidence. It is assumed that the NIT is customized software. Hence the Defense seeks to prevent the introduction of the results of the software until the Source Code is made available to the defense for complete testing and analysis.

The Plaintiff's experts' opinions regarding the above are inadmissible as they lack proper and sufficient foundation upon which to make the opinions expressed above regarding the NIT. The Plaintiff's experts' opinions regarding the NIT are based on insufficient data. The NIT deployed in the case at bar has been subject to review by the Defendant's experts who could not definitively determine whether the NIT meet the four factors outlined in *Daubert v. Merrell Dow Pharmaceuticals*, 113 S.Ct. 2786 (1983) due to the fact that the government refused to provide the Defendant's experts the Source Code used to create the NIT. Without the Source Code, Defendant's experts were forced to make up a code to test the NIT. Without the Source code, the Defendant's experts could not fully test the NIT, could not fully subject the NIT to peer review, and could not fully determine its rate of error. Until the actual Source Code used by the government is provided to the Defense Experts, it is impossible to determine if the NIT is 100% verifiable. Because the NIT Source Code has not been provided, it is impossible for to fully review the NIT, and thus the Plaintiff experts should be prevented from testifying to the results of this unverifiable Source Code.

WHEREFORE, Defendant prays for an Order in Limine excluding testimony from the Plaintiff's experts including but not limited to SA Smith, SA Tarpinian and SSA Gordon regarding the material listed herein regarding the NIT.

DATED this 25th day of June, 2015.

KIRK COTTOM, Defendant

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**CERTIFICATE OF SERVICE**

I hereby certify that on 25th day of June, 2015, I electronically filed the foregoing Brief in Support of Defendant's Motion in Limine / Daubert Motion with the Clerk of the District Court using the CM/ECF system which sent notification of such filing to the following:

Michael P. Norris, Assistant United States Attorney

As well as all parties of record using the CM/ECF system.

and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants:

N/A

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